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Water Rights Exemptions: A Long History, Uncertain Future

By Joe Kolman

Legislative Environmental Analyst

In the coming months, legislators may hear about two types of water rights that share similar characteristics and names, but raise vastly different policy questions.

Is that about as clear as high flow on the Mighty Mo'?

One type of right is known as a right that is exempt from filing. The other is an exempt ground water well. Both deal with relatively small amounts of water. And both date back about four decades to the early implementation of water law in Montana as we know it today.

Existing – Not Filed

Water rights exempt from filing may be the least well known of the two issues.

The 1972 Constitution recognized and confirmed existing uses of water and directed the Legislature to “provide for the administration, control, and regulation of water rights and

shall establish a system of centralized records, in addition to the present system of local records.”

On July 1, 1973, the Water Use Act took effect. It required that water rights existing prior to that date be finalized through a statewide adjudication in state courts. The adjudication is a judicial procedure decreeing the quantity and priority date of all existing water rights in a river basin.

A 1978 report to the Legislature detailed the “painstaking” early history of adjudication in Montana¹.

To say the least, it was painfully slow.

According to the report, the Department of Natural Resources and Conservation began the process in the Yellowstone River Basin because of impending industrial uses, water supply problems, and a lack of water use documentation.

In October 1973, work began on a 4,000-square-mile area of the Powder River Basin. The state sent notices to about 1,000 landowners directing them to file claims to their water rights.

¹ Laurence J. Siroky, “Report to the Montana Legislature Interim Subcommittee on Water Rights,” Department of Natural Resources and Conservation, April 14, 1978. Available at http://courts.mt.gov/content/water/WAAcommittee/1978dnrc_leg_report.pdf

About a year later, DNRC had recorded 8,400 declarations. At the time of the legislative report, three years later, about half of the claims in that single basin made it through fact gathering and were ready for court review.

100 Years?

At one point, it was estimated that adjudication of existing rights at the original pace would take 100 years. Simply put, it would take a century to determine priority dates and how much water people were using in 1973. Such an extreme period would conflict with the goals of adjudication, which, according to the report, were:

- document current water usage for protection against demands and lawsuits by downstream states, the federal government, and other interests outside Montana;
- document existing water rights, so the DNRC may issue or deny water use permits more intelligently;
- assist water planning by providing knowledge of the amount of unappropriated waters;
- ensure holders of water use permits that water is available, in order to promote future water development and reduce the monetary risk in appropriation facilities; and
- document individually held water rights to provide more certainty in real estate transactions and the severing and selling of water rights. The documentation also was expected to allow upstream appropriators to be certain of the extent of prior rights downstream.

Speeding Up Adjudication

The report contained a number of options for dealing with the potentially lengthy adjudication process. One option involved exempting from the filing requirement both ground water domestic rights and rights for livestock drinking from a source, called stock rights. It was estimated such a measure would cut in half the projected 500,000 claims statewide. The report contemplated the exempted rights would be adjudicated at a later date.

That suggestion, along with others, was implemented in 1979. The exemption reads:

85-2-222. Exemptions. Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources and claims for rights in the Powder River basin included in a declaration filed pursuant to the order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing require-

ments of 85-2-221(1). Such claims may, however, be voluntarily filed.

Flash forward to today. The history of quantifying water rights in existence prior to 1973 is still being written, though progress is being made. In regular reports to the Legislature, the DNRC and the Water Court report they are on track to meet goals set by the 2005 Legislature that included enforceable decrees statewide by June 2020.

Now What?

But what about those existing rights that were exempt from filing? Well, many folks heeded the last line of the law that said the claims could be voluntarily filed. They sent in about 74,000 such claims. An estimated 150,000 non-filed claims may still exist.

What does it matter? That is a question that may eventually come back to the Legislature.

On the broadest of policy levels, the goals of the adjudication as outlined in the 1970s contemplated that all rights be adjudicated. When it comes time to enforcing a water right against more recent uses, possessing a decreed water right is important. Because these claims were not filed and no way exists to file them now, they are not included in a temporary preliminary or preliminary decree.

Though the issue has not gained wide attention, a few water right holders consistently bring it up with the DNRC, the Water Court, and the Legislature. In 2011, at the request of Sen. John Brenden, R-Scobey, Chief Water Judge Bruce Loble convened the Water Adjudication Advisory Committee to tackle the problem.

Among some of those most intimate with the adjudication, concern exists about any proposal that would further delay the process. Though the exempt rights are not included in the decree, it is debatable how effectively the exempt rights would be regulated even if they were because the domestic claims are for relatively small amounts of water and the stock claims involve regulating the roaming habits of livestock.

The advisory committee, consisting of water attorneys and water users, has met several times over the interim and in September will present legislation to the Water Policy Interim Committee that would establish a voluntary filing option. Under that proposal, petitions could be filed with the Water Court to quantify the elements of a non-filed exempt claim. Notice would be provided to all water users in the basin at the expense of the petitioning water user. The petitioner would bear the burden of proof. After the Water Court quantifies the claim, it would be included in the basin decree and be subject to regulation by any appointed water commissioner. Petitions would be allowed until final decrees are

issued. All exempt claims for which a petition is not filed would remain unregulated as they are now.

More information about rights exempt from filing and the advisory committee is available on the Water Court website, <http://courts.mt.gov/water/WAAcommittee/default.mcp.x>.

Exempt from Permitting

Much better known is the issue of exempt wells.

After July 1, 1973, the Water Use Act required that those wishing to use water obtain a permit.

As in other Western states, water in Montana is distributed on a first-come, first-served basis, so new applications are analyzed for the effect on existing water users. However, the law allowed that a permit was not required for ground water appropriations of less than 100 gallons a minute for domestic, livestock, or agricultural uses.

The amount of water allowed and the rules used to implement the law have changed, but the current law and accompanying rules have been around almost two decades.

The law states that a permit is not required for a well or developed spring that diverts water at 35 gallons a minute or less and does not exceed a volume of 10 acre-feet a year. However, a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.

In recent years, legislative attempts to change the exemption, including codifying the administrative definition of combined appropriation, have failed. Challenges to the rules also have not succeeded.

Most debate in recent years centers on the use of exempt wells in residential housing developments. About two-thirds of the subdivision lots created between July 2004 and June 2011 received water from exempt wells.²

Even if each well only uses a small amount of water, some people argue that the cumulative effect is not analyzed for harm to existing water right holders to the same extent that another use that draws the same amount of water would be, such as an irrigation system. Others note that in some areas, if the effects of an exempt well are even measurable, they are so small in the larger scheme of water use as to be harmless.

Given the rural nature of Montana, some contend that an outright ban on exempt wells is unrealistic. The permitting system could be overloaded evaluating new applications. Furthermore, allowing relatively small amounts of water for domestic or stock use could be seen as an unalienable right.

But after that, options for addressing concerns about providing water for new uses, including housing, while protecting existing water right holders become more controversial.

In 2011, the Legislature passed House Bill 602, requiring a study of exempt wells. Among other things, the Legislature found that exempt wells may be adversely affecting existing water rights and that existing water law does not give the DNRC adequate direction on how to administer exempt wells.

Exempt from What?

For someone unfamiliar with Western water law, the idea that a bureaucratic permit system must be negotiated prior to using water may seem needless. If you can see water in a creek or someone assures you that cool, clean liquid is bountiful below the surface, what more does one need to know?

Quite a bit.

The actual presence of water at the time one wants to use it and in the quantity desired are just two of the criteria that must be proven before most would-be water users can appropriate the precious but reusable resource. The permitting requirements of law apply to both surface water and ground water.

The criteria for a permit in Montana are contained in 85-2-311, MCA. They include a test for physical availability, which for a ground water well entails an aquifer test supervised by a hydrogeologist or other professional, a minimum duration of pumping, an observation well, and a report that includes ground water and surface water monitoring data.

The examination of legal demands and possible adverse effects includes:

- identifying prior appropriators;
- comparing the physical water supply within the area of impact at the point of diversion during the period of diversion requested with existing legal demands;
- describing the effect on existing wells and hydraulically connected surface water; and
- demonstrating that the proposed diversion can be regulated during periods of water shortage to satisfy rights of prior appropriators.

The permitting process allows an opportunity for anyone whose property, water rights, or interests would be adversely affected to object.

Objections may be withdrawn or denied, or the approval may be conditioned to mitigate objections. The permit might be

² Department of Environmental Quality Subdivision Review Program.

granted for less water than sought in the application, or the water use may require the retirement of another water right to offset the new use. Monitoring and reporting of the water use also may be required.

None of that applies to the exemptions. A well is drilled, and the water is put to use. To obtain a certificate of water right, which includes a priority date, the water user pays the \$125 to the DNRC and provides the location, the flow rate, and the beneficial use of the well.

By the Numbers

While the effect of water use by exempt wells is not analyzed by the permitting process, the committee examined several scenarios based on well location, assumptions of actual use, and area-specific availability and allocation of ground water.

The exemption allows for a flow rate of 35 gallons a minute, not to exceed a volume of 10 acre-feet a year.³

The amount of water allowed under the exemption is sufficient for a variety of uses. Ten acre feet could quench the thirst of 500 cows for a year, keep five acres of grass green in Bozeman, sprinkle up to seven acres of pasture, serve a 150-room hotel, run a gravel operation, or supply a 10-lot subdivision in Billings.⁴

In terms of the water used in a housing development, a household of 2.5 people would divert an estimated one-third of a single acre-foot per year for in-house uses, including drinking, cleaning, and toilet operation. In Bozeman, an acre of lawn and garden could be irrigated with 2 acre-feet a year.⁵

The language in the exemption refers to the amount of water pumped out of the ground. But while the use of water is a property right that can be owned by an individual, the same water will be used by many water right holders as it cycles through each use. When it comes to debating the effect the exemption may have on existing users, the other component is the amount of water consumed.

Consumed water does not return to the system, meaning it cannot be used by other water right owners. The largest

consumptive uses are evaporation from soil and surface water bodies and transpiration, which is water used by plants.⁶

How much water is consumed depends on the use. A household that diverts one-third of an acre-foot for 2.5 people would consume just .03 acre-feet because most of the water is returned through the wastewater system. Nine out of every 10 gallons of water pumped out of the ground returns to the system. In contrast, a growing lawn consumes about 80 percent of the water put on it.⁷

On a statewide scale, using assumptions more conservative than those above, the amount of water diverted by exempt wells in closed river basins in 2010 was more than 30,000 acre-feet with the consumed volume of almost 18,000 acre-feet.⁸

But caution should be used when looking at the cumulative use of water statewide. The

Ground Water Investigation Program at the Montana Bureau of Mines and Geology examined consumptive use of exempt wells on a much smaller scale.

The percentage of consumptive use varied widely. In the lower Beaverhead River study area, exempt wells consumed just 2 percent of the water budget. In the Eightmile Creek area of Ravalli County, lawn watering accounted for more than half of the water consumed.

In small study areas, marked differences may exist in consumptive use based on an annual budget and a smaller, seasonal time-frame. The domestic use in April and May in the Eightmile study area isn't much different in early spring than overall. However, in the Four Corners study area, the consumptive use of lawns in early spring is a much greater percentage of the water budget than when it is measured annually.

In subbasin study areas in regions where the growth of exempt wells has raised concerns — including Florence, Helena, Belgrade, and Bozeman — the study found that lawn watering from exempt wells consumed 15 percent of all

³ This reflects the 1991 change in law from 100 gallons per minute with no limit on volume.

⁴ DNRC Presentation to the Water Policy Interim Committee, Sept. 13, 2011. Available at: <http://leg.mt.gov/content/Committees/Interim/2011-2012/Water-Policy/Meeting-Documents/September-2011/water-use-table.pdf>.

⁵ Ibid.

⁶ John Metesh, "Hydrogeology Related to Exempt Wells in Montana", Montana Bureau of Mines and Geology.

⁷ DNRC Presentation to the Water Policy Interim Committee, Sept. 13, 2011. Available at: <http://leg.mt.gov/content/Committees/Interim/2011-2012/Water-Policy/Meeting-Documents/September-2011/water-use-table.pdf>.

⁸ DNRC Presentation to the Water Policy Interim Committee, June 1, 2011. Number does not include stock wells. Assumes .21 acre-feet diverted for in-house use and .95 diverted for half-acre lawn. Available at: <http://leg.mt.gov/content/Committees/Interim/2011-2012/Water-Policy/Meeting-Documents/June-2011/exempt-well-statistics-dnrc.pdf>.

water not returned to the system, or just less than 5,000 acre-feet annually.

What effect, if any, the consumptive use of exempt wells may have on existing surface right holders is not analyzed. However, the DNRC presented testimony to the Water Policy Interim Committee on the legal availability of water in some of the areas studied by the Ground Water Investigation Program.

Considering that an exempt well would be a year-round use, the DNRC concluded that in the Threemile Creek Area, any depletion of surface flows by a new ground water use would affect existing demands. While water is legally available during certain times of the year in Eightmile Creek and the Bitterroot River, DNRC Water Division Administrator Tim Davis said that a year-round use of ground water that was subject to a legal availability analysis would likely need to also provide mitigation to offset effects on existing water rights.⁹

The Montana Association of Realtors in testimony before the WPIC referenced a study the association commissioned in 2008 on exempt wells. That study found that "it is difficult to conceive that there would be any practical circumstance in any closed basin in Montana where future growth in exempt wells would result in any discernible, detectable, or measurable adverse impact to any prior surface water appropriator."¹⁰

What are the Options?

The WPIC debated several options presented by those involved in the exempt well debate, including conservationists, well drillers, the development community, and senior water right holders.

At its final meeting in September, the committee will consider proposals that would apply only in closed river basins in western Montana. One would revise the flow rate and volume of the exempt well, while also requiring larger, denser subdivisions to install public water and sewer systems. The other would allow subdivisions only one exemption of 35 gallons per minute and 10-acre feet, no matter how many lots are involved.

The bill drafts and more information about the study are available on the committee's website, www.leg.mt.gov/water.

⁹ Testimony by Tim Davis, Water Division Administrator, Department of Natural Resources and Conservation, to the Water Policy Interim Committee, Jan. 10, 2012. Available at:

<http://leg.mt.gov/content/committees/interim/2011-2012/Water-Policy/minutes/January-10-2012/Exhibit03.pdf>.

¹⁰ Testimony by Jim Day, representing the Montana Association of Realtors, to the Water Policy Interim Committee, Jan. 10, 2012. The association contracted with Nicklin Earth and Water Inc for two reports that were submitted to WPIC in 2008. The one quoted above is "Update on Evaluations Significance of Exempt Wells, Montana's Closed Basins." Available at:

http://leg.mt.gov/content/Committees/Interim/2007_2008/water_policy/staffmemos/evaluationssignificance.pdf.

The other report is "Water Rights in Closed Basins." Available at:

http://leg.mt.gov/content/Committees/Interim/2007_2008/water_policy/staffmemos/waterrightsnicklin.pdf.

The DNRC responded to the Nicklin studies, concluding in part that the analysis only examined annual water budgets on a basin wide scale to conclude that there are no cumulative impacts from exempt wells. Available at:

http://leg.mt.gov/content/Committees/Interim/2007_2008/water_policy/staffmemos/nicklinreportcomments.pdf.

